Supreme Court, U.S.
FILED
OCT 7 2002
CLERK

No. 02-342

IN THE
Supreme Court of the United States

KEY PHARMACEUTICALS, SCHERING-PLOUGH CORPORATION AND SCHERING CORPORATION,
Petitioners,
v.
FREDERICK D. EDWARDS, M.D.,
Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

BRIEF *AMICUS CURIAE* OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONERS

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PRODUCT LIABILITY ADVISORY COUNCIL, INC.'S BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is

[1] Petitioners' and Respondent's letters of consent to the filing of this brief *amicus curiae* by the Product Liability Advisory Council, Inc., have been lodged with the Clerk of the Court. No counsel for either party has authored this brief in whole or in part, and no person or entity other than the *amicus* has made a monetary contribution to the preparation or submission of this brief.

a non-profit association with 126 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 600 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.

This case is of interest to *amicus* because it provides a sound vehicle for this Court to address the due process problems created by the imposition of multiple punitive damages awards. The members of *amicus* are active in the business and manufacturing communities and their members are the primary victims of excessive and repetitive punitive damages awards. Ultimately, the impact of runaway punitive damages awards is felt by the consumer who purchases goods and services. *Amicus* has a unique understanding of the impact of multiple punitive damage awards, as well as the due process implications of inflicting multiple punitive damage awards against a single defendant for the same conduct.

STATEMENT OF THE CASE

PLAC adopts and incorporates Petitioners' statement of the case.

SUMMARY OF ARGUMENT

This case crystallizes the thirty-year debate about the constitutional due process issue presented by double punishment in civil actions. Distinguished judges and scholars have grappled with the constitutional implications of multiple punitive damages awards since such awards became common in tort actions in the late 1960s and early 1970s. They have recognized that the very core of due process prevents double punishment for the same wrongdoing. Multiple awards also raise Eighth Amendment concerns in situations like this one where a portion of punitive damage awards are to be paid to the state.[2]

While state and lower federal courts have acknowledged the constitutional due process issue, these individual courts are powerless to create and enforce the nationwide resolution that this problem requires. They have made do with a hodgepodge of stop-gap approaches, while calling for direction at a national level.

This case provides a unique opportunity for this Court to address an issue that only it can resolve – due process violations created by the multiple imposition of punitive damages for the same conduct. No state court or state legislature has the power address this subject. It is not one on which Congress is likely to take action. The Court also has the opportunity to address the application of the Excessive Fines Clause in civil cases where the state is to share in the punitive award. For these reasons, the Petition for Writ of Certiorari should be granted.

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[2] At the time of the case, the State of Oregon was entitled to fifty percent of a punitive damage award according to statute. The statute has since been amended to increase the amount of a punitive damage award that a successful plaintiff must share with the state to sixty percent of the award. *See* Or. Rev. Stat. § 18.540(1)(b) (2001).

ARGUMENT

I. INTRODUCTION

This case puts squarely before this Court the constitutionality of multiple punitive damage awards against a single defendant for the same course of conduct. In the instant case, an Oregon jury awarded two separate parties punitive damages against Key Pharmaceuticals based on the exact same evidence of the defendant's alleged nationwide course of conduct presented during a single trial. The same alleged wrongful in- and out-of-state conduct was used as a predicate for two separate punitive damage awards, as well as to augment each individual award. Unlike a situation involving multiple trials against a common defendant, there is no issue as to the identity of the conduct to be deterred or punished.[3]

In this case, the jury both awarded punitive damages to a patient who alleged he was injured because of the defendant's conduct, and to the patient's physician, Dr. Edwards, who claimed that the defendant's conduct had damaged his professional reputation because of the plaintiff's injury. It is remarkable that the jury was permitted to award Dr. Edwards punitive damages. His conduct helped bring about plaintiff's injury. He failed to read a series of warnings about the de-

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[3] This Court agreed in *State Farm Mutual Automobile Insurance Company v. Campbell*, to consider whether the Due Process Clause permits a punitive damages award to be premised on out-of-state conduct of a defendant that has no bearing on plaintiff's injury. No. 981564, 2001 WL 1246676 (Utah Oct. 19, 2001), *cert. granted*, 122 S. Ct. 2326 (2002) (No. 01-1289). While the instant case involves punitive awards based on nationwide conduct, it more importantly presents a unique and important opportunity for this Court to address constitutional due process issues raised by multiple punitive awards. As important as the issue of extraterritorial punishment is, *Campbell* does not involve an issue for which individual state and lower federal courts have cried out for direction for three decades.

fendant's Theophylline product, Theo-Dur™ -- including a specific warning that the drug's interaction with a second drug, Ciprofloxacin, could cause the toxicity problem alleged by the patient. It is even more astonishing and unconstitutional that Supreme Court of Oregon permitted an award for punitive damages to both the injured patient and Dr. Edwards. This is why.

II. MULTIPLE IMPOSITION OF PUNITIVE DAMAGES FOR THE SAME CONDUCT VIOLATES THE CONSTITUTION.

As Petitioners' brief makes clear, the jury in this case was permitted to make two awards of punitive damages, one of $35 million and another of $22.5 million, for the defendant's alleged wrongful conduct in the marketing of its pharmaceutical product Theo-Dur.™ The core of the constitutional violations is that the jury considered precisely the same wrongful conduct of the defendant in each case, yet was permitted to make two separate, very large awards punishing the defendant for that conduct.[4]

A. Double Punishment for the Same Conduct is Fundamentally Unfair.

As long ago as 1967, the distinguished Judge Henry Friendly appreciated the fundamental unfairness of punishing a defendant again and again for the same harm. He said:

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs

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[4] Dr. Edwards' counsel may contend that the defendant did not endure double punishment because it settled the case with the injured plaintiff. This is an empty assertion. The amount of the settlement was inflated by the jury's very large punitive damage award of $35 million to the plaintiff. Imposing a second punitive damage award of $22.5 million for that same conduct is a double punishment, regardless of the identity of the person to whom it was to be paid.

> are staggering . . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967) (addressing availability of multiple punitive damages awards in products liability cases). As Judge Friendly recognized, the punitive damages remedy historically was limited to intentional torts (such as assault and battery) in cases involving a single victim, so that "a punitive recovery by him ends the matter, except for such additional liability as may be provided for by the criminal law." *Id.* at 838. Even when punitive damages practice was extended beyond intentional torts to cases where a defendant acted in conscious disregard to the interests of others, the number of plaintiffs were still few and therefore punitive damages were unlikely to result in "over-severe admonition" of the defendant. *Id.* at 838-39 & n.7.

Multiple punitive damages awards present significant problems for plaintiffs and defendants. As Judge Friendly and other jurists have appreciated, the unfairness and devastating impact of multiple punishment is not only felt by defendants, it also can jeopardize the rights of future plaintiffs. *See Roginsky*, 378 F.2d at 839-42. For instance, multiple "windfall" recoveries of punitive damages deplete a defendant's limited resources. Such damage awards may eventually drive a defendant out of business, no matter how large or how wealthy the defendant. *See generally Froud v. Celotex Corp.*, 437 N.E.2d 910, 914 (Ill. 1982) (Sullivan, J., concurring) ("[I]t cannot be denied that the spectre of the destruction of companies, and even individuals, as a result of punitive damage awards is a threatening, present reality.").

Repetitive awards ultimately endanger the ability of future claimants to recover even basic compensatory damages.

This problem is particularly visible in the asbestos context where at least 56 companies have declared bankruptcy, in part due to multiple punitive damage awards and the inflation of settlements caused by such claims. *See generally* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331, 339, 352-57 (2002). Over 200,000 asbestos cases are pending nationwide and 700,000 more cases are expected to be filed by 2050. *See id.* at 337. Fortunately, some courts have severed, deferred, or stayed indefinitely repetitive punitive damage claims in asbestos cases to protect the ability of current and future claimants to receive compensatory awards. *See, e.g.*, *Abate v. A.C. & S., Inc.*, No. 8923704, slip op. at 26 (Md. Cir. Ct. Dec. 9, 1992) (staying all punitive damage awards in Baltimore City asbestos cases); *Keene Corp. v. Levin*, 623 A.2d 662, 663 (Md. App. 1993) (noting a trial court judge's deferral punitive damage payments "until all Baltimore City plaintiffs' compensatory damages are paid.").

As one federal court of appeals warned, "If no change occurs in our tort or constitutional law, the time will arrive when [a defendant's] liability for punitive damages imperils its ability to pay compensatory claims and it corporate existence." *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151, 1155 (5th Cir. 1990); *see also Bishop v. General Motors Corp.*, 925 F. Supp. 294, 298 (D.N.J. 1996) ("Indeed, one of the many cogent criticisms of punitive damages is that multiple punitive [damage] liability can both bankrupt a defendant and preclude recovery for tardy plaintiffs.").

Corporate bankruptcies have a devastating "ripple" effect that can extend far beyond the defendant company to injured persons who are thereafter unable to recover compensation for their injuries. Company employees may lose their jobs. Other businesses that rely on the company or its employees may lose income. Economic harm to the company also af-

fects shareholders, such as pension funds and ordinary citizens, and other investors who face the loss of their savings. As the Fifth Circuit recognized, "Neither the company's innocent shareholders, employees and creditors, not future . . . claimants will benefit from this death by attrition." *Edwards*, 911 F.2d at 1155.

Multiple imposition of punitive damages also poses a significant obstacle to global settlement negotiations in repetitive litigation and blocks the ability of claimants to recover quickly for their injuries or the loss of loved ones. As one federal district judge wrote: "Barring successive punitive damages awards against a defendant for the same conduct would remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution of the damage claims of many thousands of injured plaintiffs." *See* William Schwartzer, *Punishment Ad Absurdum*, 11 Cal. Law. 116 (Oct. 1991).

The potential for multiple punitive damage awards can also have a chilling effect on job-creators and the general public, who are denied socially beneficial products. *See generally* Bruce N. Kuhlik & Richard F. Kingham, *The Adverse Effects of Standardless Punitive Damage Awards on Pharmaceutical Development and Availability*, 45 Food Drug Cosm. L. J. 693 (1990) ("There is a growing body of evidence that the threat of punitive damages deters the development and marketing of beneficial products."). For instance, this chilling effect is illustrated by the litigation involving the drug Bendectin, a unique and effective anti-nausea morning sickness drug once marketed by Merrell Dow Pharmaceuticals, Inc. Although the drug had been and still is approved by the Food and Drug Administration and is widely acclaimed by health care professionals worldwide, Merrell Dow withdrew Bendectin from the market in 1983, in part from concerns about punitive damages liability. *See*

id. at 693.[5] As this case demonstrates, the sheer unpredictability of the current system results in over-deterrence.

Finally, multiple punitive damage awards undermine the integrity of the justice system by transforming it into a lottery where a few people collect arbitrary "wins" at the expense of everyone else – the company, its employees, its shareholders, and ordinary consumers. With the exception of those lawyers who reap windfalls from repetitive punitive damages, nobody can seriously argue that repeatedly punishing anyone for a single act makes sense or benefits society.

At some point, punitive damages no longer serve to punish and deter, but instead become grossly excessive in violation of the Fourteenth Amendment. *See BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996). The due process unfairness of imposing multiple punitive damages cannot be allowed when the defendant has already been punished. In a series of sequential cases, such an admission would jeopardize the defendant's ability to have a fair trial. In this instance, where multiple punitive damages awards were made in the same case, the issue was virtually impossible to address with the jury.

B. Courts Raise Concerns About the Due Process Implications of Multiple Punitive Awards But Have Been Unable to Develop a Consistent or Effective Solution.

Many judges[6] and commentators[7] have voiced concern that punishing a defendant over and over again for the same

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[5] Merrell Dow has never lost a final judgment in any Bendectin case in the twenty-year history of the litigation; trial judges often dismiss these cases prior to trial. *See, e.g., Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311 (9th Cir. 1995); *Turpin v. Merrell Dow Pharm., Inc.*, 736 F. Supp. 737 (E.D. Ky. 1990), *aff'd*, 959 F.2d 1349 (6th Cir. 1992).

[6] *See, e.g., Dunn v. Hovic*, 1 F.3d 1371, 1385 (3d Cir.) (en banc), *modified in part*, 13 F.3d 58 (3d Cir. 1993) ("The principle issue impel-

course of conduct raises "serious due process concerns."[8] As the Third Circuit recognized, "powerful arguments have been made that, as a matter of constitutional law or of substantive tort law, the courts should shoulder some responsibility for preventing repeated awards of punitive damages for the same act or series of acts." *In re School Asbestos Litig.*, 789 F.2d 996, 1005 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). The Northern District of California also expressed concern that:

> overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process. Certainly the principle of res judicata, the notion that litigation must come to an end, that a party cannot sue or be sued repeatedly on the same cause of action, is a part of the process that is due under our constitutional system.

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ling us to take this otherwise routine product liability case in banc is the effective of successive punitive damage awards in mass tort cases arising from the same course of conduct: We, as well as other courts, have expressed strong concerns in that regard.")

[7] *See, e.g.*, David G. Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 Vill. L. Rev. 363, 394 (1994) (observing that the issue of multiple punitive damage awards "is a problem of enormous complexity which requires much analysis and ingenuity"); Victor E. Schwartz & Liberty Magarian, *Multiple Punitive Damage Awards in Mass Disaster and Product Liability Litigation: An Assault on Due Process*, 8 Adelphia L. J. 101 (1992); Dennis Jones *et al.*, *Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 40 Ala. L. Rev. 1 (1991); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986).

[8] *Dunn*, 1 F.3d at 1385; *see also King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1033 (5th Cir. 1990) (while "acutely conscious" of Judge Friendly's "prophetic words" about adverse effects of multiple punitive damages, binding Fifth Circuit precedent requires panel to set aside its "misgivings" and reject defendant's constitutional argument against multiple punitive damages awards), *cert. denied sub nom Celotex Corp. v. King*, 500 U.S. 942 (1991).

In re N. Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig., 526 F. Supp. 887, 899 (N.D. Cal. 1981), *vacated and remanded on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).[9]

One of the many courts that have wrestled with the problem expressly held that "subjecting defendants to the possibility of multiple awards of punitive damages for the single course of conduct . . . would deprive defendants of the fundamental fairness required by the Due Process Clause." *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1064, *vacated*, 718 F. Supp. 1233 (D.N.J. 1989) (abiding by previous ruling that repetitive awards of punitive damages for the same conduct violate due process), *rev'd on other grounds sub nom Juzwin v. Asbestos Corp.*, 900 F.2d 686 (3d Cir.), *cert. denied*, 498 U.S. 898 (1990). That district court astutely acknowledged that although an award in an individual case may be fair and reasonable, the aggregate amount of repeated awards may be constitutionally excessive. *Id.* at 1055. Simply stated, redundant awards of punitive damages "cannot be tolerated under requirements of due process if it amounts to unrestricted punishment." *Id.* at 1064.[10]

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[9] *See also In re "Agent Orange" Prod. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("[W]hen a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct. There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times a defendant may be punished for a single transaction."), *aff'd* 818 F.2d 145 (2d Cir. 1987), *cert. denied sub nom Pinkey v. Dow Chem. Co.*, 484 U.S. 1004 (1988).

[10] While this Court has ruled that the Excessive Fines Clause of the Eighth Amendment does not apply in purely private actions seeking punitive damages, *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 268 (1989) (no Excessive Fines violation where government does not participate in punishment), excessiveness concerns are critical to the analysis of the constitutionality of punitive damages awards under the Due Process Clause. *See, e.g., BMW of N. Am. v. Gore*, 517

Many lower courts express strong concern about the constitutionality of multiple punitive damage awards, but have taken a variety of conflicting approaches in attempting to craft a solution. Some courts have attempted to craft innovative solutions but have fallen short of their goal; others have adopted short-term solutions to resolve the case immediately before them; still other courts have abdicated responsibility altogether because no one state or lower federal court can solve the problem.

One lower federal court sought to resolve the constitutional due process problem by allowing only one punitive award based on a single course of conduct in mass tort litigation. *See Juzwin*, 705 F. Supp. at 1065 (where defendants can establish that punitive damages already have been assessed for conduct at issue in the action, "the court will dismiss plaintiff's claim for such punitive damages"). This ruling was overturned on other grounds, *see* 900 F.2d 686, and other courts have declined to endorse this approach. *See, e.g.*, *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 283-84 (D.N.J. 1989) (*Juzwin* solution is "arbitrary," "harsh and inequitable" and creates a race to the courthouse door).

U.S. 559 (1996); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991); *TXO Prod. Co. v. Alliance Res. Corp.*, 509 U.S. 443 (1993). Similarly, while this Court has seemingly indicated that the Double Jeopardy Clause may not apply to private suits seeking punitive damages, *Hudson v. United States*, 522 U.S. 93 (1997), double jeopardy concerns are echoed in the Due Process Clause and its guarantee of fundamental fairness. *See* Gary T. Schwartz, *Mass Torts and Punitive Damages: A Comment*, 39 Vill. L. Rev. 415, 423-31 (1994) (suggesting that "the core of the prohibition against double jeopardy is probably included in the Due Process guarantee," and arguing its applicability to multiple punitive damages that take into account total harm); 2 Am. Law Inst., *Reporters' Study, Enterprise Responsibility for Personal Injury* 260 (1991) (concluding that repeatedly penalizing corporate defendants for a single wrongful judgment or action is "antithetical to the protection against double jeopardy that characterizes overtly penal regimes").

Other courts have attempted to solve the problem by certifying the punitive damages issue for class action resolution. In product liability litigation over the Dalkon Shield, for example, the federal district court sought to address the problem by certifying a nationwide class action on the issue of punitive damages. *See In re Dalkon Shield,* 526 F. Supp. at 893. The court explained that to balance multiple plaintiffs' rights to obtain punitive awards with the defendant's due process rights "the class action is the best available device to protect the interests of all parties." *Id.* at 900. As noted by the Ninth Circuit on appeal, though, commonality and predominance issues undermine this approach. *See* 693 F.2d at 850. The Ninth Circuit rejected the nationwide class certification for a variety of reasons – including the conflicting state laws governing punitive damages. *See id.* at 850-52 (stating that "a class action ... is not the only way to protect a defendant from unreasonable punitive damages," but failing to offer any suggestions on how that could be done); *see also In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied*, 459 U.S. 988 (1982) (reversing certification of punitive damages class for lack of commonality factors and violation of the Anti-Injunction Act).

Some courts have suggested that defendants introduce evidence at trial that they have been impacted by prior punitive damage awards. *See, e.g., Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) (recognizing the potential for "serious constitutional concerns" in the multiple imposition of punitive damages for the same conduct but declining to address the issue because the defendant "neither adequately raised this legal argument nor made sufficient record on it in the trial court"). But defendants who are focused on liability in a particular case should not be expected to introduce evidence of prior punitive damage awards resulting from the same conduct. Such information would be highly prejudicial. *See* David G. Owen, *Problems in Assessing Punitive*

Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 52-53 (1982) (noting that "for obvious tactical reasons," a defendant "fairly might wish to avoid presenting" such information to the jury during the liability phase of a trial).

Moreover, some courts have suggested that multiple punitive damage awards cannot pose a due process issue unless the defendant is on the verge of collapse. *See, e.g.*, *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1243-44 (Kan. 1987) (finding in Dalkon Shield litigation that there was insufficient information before the court to determine whether multiple punitive damage awards would lead the defendant to insolvency); *Leonen*, 717 F. Supp. at 286 (finding that "the 'overkill argument is not entirely without merit," but "[t]here is nothing before the court which indicates that any of the defendants . . . are facing bankruptcy"). While being forced into bankruptcy by repetitive punitive awards for the same misconduct certainly would signal a violation of due process, surely such constitutional protections are triggered at some earlier point, before the defendant business is wiped out. *See* Victor E. Schwartz & Liberty Magarian, *Multiple Punitive Damage Awards in Mass Disaster and Product Liability Litigation: An Assault on Due Process*, 8 Adelphia L. J. 1, 73 (1992) ("It is incongruous to suggest that awards of punitive damages for the same conduct need not be reined in until the defendant is teetering on the brink of extinction.").

Individual courts have thrown up their arms and declared that they are powerless to resolve a problem which requires a national solution. They have asked this Court for guidance. *See, e.g.*, *Dunn*, 1 F.3d at 1389 (raising concerns about potential for due process violations from multiple punitive damages awards in asbestos cases, but declining to be so "intrepid" as to "iterate a blanket policy judgment . . . in light of the Supreme Court's studied silence on the policy issue"); *Jackson v. Johns-Manville Corp.*, 781 F.2d 394, 417 (5th

Cir.) (Clark, J., dissenting) (arguing that multiple punitive damages issue was matter of national public policy and should have been certified to the United States Supreme Court "because matters of national public policy have nationwide application"), *cert. denied,* 478 U.S. 1022 (1986). As the Supreme Court of Texas declared, "It may be that a truly uniform solution can only be fashioned by either the [United States] Supreme Court or Congress." *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35 (Tex. 1996). Likewise, the Iowa Supreme Court has stated,

> We do not disagree that the problem of successive punitive damages awards in mass tort cases arising from the same conduct is a serious one . . . . We believe neither our action nor legislative action in Iowa will curb the problem of multiple punitive damages awards in mass tort litigation.

Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 865-66 (Iowa 1994). The New Jersey Supreme Court also expressed its frustration when it commented that "[a]t the state court level, we are powerless to implement solutions to the nationwide problems created by [multiple punitive damage awards.]" *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 480 (N.J. 1986).

III. CERTIORARI IS ALSO APPROPRIATE TO DETERMINE WHETHER THE DOUBLE PUNISHMENT IN THIS CASE VIOLATES THE EXCESSIVE FINES CLAUSE.

Not only may double punishment violate the defendant's due process rights, the state's recovery of half of the punitive award is additional cause for concern. Punitive damages are not ordinary civil or tort law damages.[11] Unlike compensa-

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[11] *See* Victor E. Schwartz *et al.*, Prosser, Wade and Schwartz's Cases and Materials On Torts, 549-50 (10th ed. 2000).

tory damages, which provide payment for economic losses (e.g., lost wages and medical expenses) and noneconomic injuries (e.g., "pain and suffering"), punitive damages are not awarded to compensate for a harm. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (noting that punitive damages "are not compensation for injury . . . [but] are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence").[12] Rather, punitive damages are "quasi-criminal" in nature and "operate as 'private fines' intended to punish the defendant and deter future wrongdoing." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991)).

Given the quasi-criminal nature of punitive damage awards, repeated punishment for the same course of conduct may not only violate due process, but also may run afoul of Eighth Amendment's prohibition of excessive fines. As the relevant portion of the Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, not cruel and unusual punishments inflicted." U.S. Const. amend. VIII. In *Browning-Ferris*, 492 U.S. at 262, 266, the Court ruled that the Excessive Fines Clause "appl[ied] primarily, and perhaps exclusively, to criminal prosecutions and punishments" and its "primary focus" was not concerned with civil damages. However, the Court also qualified its ruling, noting that the Excessive Fines Clause "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action *nor has any right to receive a share of the damages awarded.*" *Id.* at 264 (emphasis added).

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[12] *See also* W. Page Keeton *et al.*, Prosser and Keeton on the Law of Torts, § 2, at 9 (5th ed. 1984) (explaining that punitive damages are awarded to punish defendant, teach defendant not to "do it again," and deter others from similar behavior).

More recently, in *Cooper Industries,* the Court recognized that although states have broad discretion in imposing criminal penalties and punitive damages, "the Due Process Clause of the Fourteenth Amendment . . . imposes substantive limits on that discretion." 532 U.S. at 433. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the states. 532 U.S. at 434-35 (citing *Furman v. Ga.*, 408 U.S. 238 (1972) (per curiam)). In the present case, the state's collection of a share in the multiple punitive damage awards imposed against the same defendant for identical conduct may result in an unconstitutionally excessive fine, irrespective of the awards' excessiveness under the *Gore* factors.[13]

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[13] *See McBride v. Gen. Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990) (ruling that the Georgia statute allocating 75% of punitive damage awards to the state's general fund was unconstitutional because it "converts the civil nature action of the prior Georgia punitive damages statute into a statute where fines are being made for the benefit of the State, contrary to the constitutional prohibitions as to excessive fines and contrary to the double jeopardy clause of the Fifth Amendment to the Constitution of the United States").

CONCLUSION

For the foregoing reasons, *amicus curiae* Product Liability Advisory Council, Inc. requests that this Court grant the Petition for a Writ of Certiorari in this action.

Respectfully submitted,

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Dated: October 7, 2002

APPENDIX A

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
CORPORATE MEMBERS

3M

Allegiance Healthcare Corporation

Altec Industries

American Suzuki Motor Corporation

Andersen Corporation

Anheuser-Busch Companies

Ansell Healthcare, Inc.

Appleton Papers, Inc.

Aventis Pharmaceuticals Inc.

BASF Corporation

Baxter International, Inc.

Bayer Corporation

Beretta U.S.A Corp.

BIC Corporation

Biro Manufacturing Company Inc.

Black & Decker (U.S.) Inc.

BMW of North America, LLC

Bombardier Recreational Products

BP Amoco Corporation

Bridgestone/Firestone, Inc.

Briggs & Stratton Corporation

Bristol-Myers Squibb Company

Brown and Williamson Tobacco

Brown-Forman Corporation

Brunswick Corporation

Caterpillar Inc.

Centerpulse USA Inc.

Chevron Corporation

Compaq

Continental Tire North America, Inc.

Cooper Tire and Rubber Company

Coors Brewing Company

Crown Equipment Corporation

DaimlerChrysler Corporation

Dana Corporation

Deere & Company

Delphi Corporation

Dorel Juvenile Group, Inc.

E & J Gallo Winery

E. I. DuPont de Nemours and Company

Eaton Corporation

Eli Lilly and Company

Emerson Electric Co.

Engineered Controls International, Inc.

Estee Lauder Companies

ExxonMobil Corporation

FMC Corporation

Ford Motor Company

General Electric Company

General Motors Corporation

Georgia-Pacific Corporation

GlaxoSmithKline

GLOCK, Inc.

Great Dane Limited Partnership

Guidant Corporation

Harley-Davidson Motor Company

Harsco Corporation, Gas & Fluid Control Group

Honda North America, Inc.

Hyundai Motor America

International Truck and Engine Corporation

Isuzu Motors America, Inc.

Johnson & Johnson

Johnson Controls, Inc.

Joy Global Inc.

Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.

Kolcraft Enterprises, Inc.

Kraft Foods North America, Inc.

Mazda (North America), Inc.

McNeilus Truck and Manufacturing, Inc.

Medtronic, Inc.

Mercedes-Benz of North America, Inc.

Michelin North America, Inc.

Miller Brewing Company

Mitsubishi Motor Sales of America, Inc.

Niro Inc.

Nissan North America, Inc.

Novartis Pharmaceuticals Corporation

Otis Elevator Company

PACCAR Inc

Panasonic

Pentair, Inc.

Pfizer Inc.

Pharmacia Corporation

Philip Morris Companies Inc.

Polaris Industries, Inc.

Porsche Cars North America, Inc.

Purdue Pharma L.P.

Raytheon Aircraft Company

Remington Arms Company, Inc.

Rheem Manufacturing

RJ Reynolds Tobacco Company

Schindler Elevator Corporation

SCM Group USA Inc.

Sears, Roebuck and Co.

Shell Oil Company

Siemens Corporation

Smith & Nephew, Inc.

Snap-on Incorporated

Sofamor Danek, Medtronic Inc.

Solutia Inc.

Sturm, Ruger & Company, Inc.

Subaru of America, Inc.

Sunbeam Corporation

Synthes (U.S.A.)

Textron, Inc.

The Boeing Company

The Dow Chemical Company

The Goodyear Tire & Rubber Company

The Heil Company

The Lincoln Electric Company

The Procter & Gamble Company

The Raymond Corporation

The Sherwin-Williams Company

The Toro Company

Thomas Built Buses, Inc.

Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.

TRW Inc.

UST (U.S. Tobacco)

Volkswagen of America, Inc.

Volvo Cars of North America, Inc.

Vulcan Materials Company

Water Bonnet Manufacturing, Inc.

Whirlpool Corporation

Wilbur-Ellis Company

Wyeth

Yamaha Motor Corporation, U.S.A.

Zimmer, Inc.